Filed 6/15/09 Fireman's Fund Ins. v. De Niro CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

FIREMAN'S FUND INSURANCE COMPANY, Plaintiff and Appellant, v. ROBERT DE NIRO, Defendant and Respondent.	B208336 (Los Angeles County Super. Ct. No. BC359977)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Affirmed.

Nelsen Thompson Pegue & Thornton, Jaymeson Pegue and Phillip H. Thompson for Plaintiff and Appellant.

Caldwell Leslie & Proctor, Christopher G. Caldwell, David C. Codell, Robyn C. Crowther and Jeanne A. Fugate for Defendant and Respondent.

I. INTRODUCTION

Plaintiff, Fireman's Fund Insurance Company, sought to recover from defendant, Robert De Niro, for covered losses attributable to defendant's inability, for medical reasons, to commence filming a movie, Hide and Seek (Twentieth Century Fox 2005). Plaintiff alleged otherwise applicable insurance was rescinded because defendant made material misrepresentations in connection with the application for insurance; specifically, he failed to disclose he had undergone a prostate biopsy. Plaintiff purports to appeal from a March 26, 2008 summary judgment in favor of defendant and a May 23, 2008 minute order denying its motions for a new trial and for leave to file a first amended complaint. We construe the appeal as from the July 10, 2008 amended judgment, which includes an award of costs to defendant. (Cal. Rules of Court, rule 8.104 (e); *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 669; *In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1262, fn. 4.) We conclude there was no triable issue of material fact with respect to defendant's failure to disclose that he had undergone a prostate biopsy procedure and plaintiff has not shown the trial court abused its discretion in denying its motion to file a first amended complaint. Accordingly, we affirm the judgment.

II. BACKGROUND

A. Defendant's Medical History

Defendant had always been vigilant about monitoring and maintaining his health. He first saw Dr. Michael Brodherson, a New York urologist, on January 29, 1980. Defendant was then 36 years old. It was a normal part of Dr. Brodherson's procedure to examine the prostate of a 36-year-old man. Dr. Brodherson testified at his deposition, "[Defendant] complain[ed] that he had difficulty voiding after sexual activity, but I also recall, I think, that he at the time had microscopic hematuria." Microscopic hematuria

means red cells in the urine. Dr. Brodherson placed defendant on Bactrim and Cystospaz. Further, because of the red cells, Dr. Brodherson recommended that defendant undergo a cystoscopy, which is a telescopic examination of the bladder, urethra, and prostate. Dr. Brodherson recorded the results of that test, received in February 1980, as "prostatitis, urethritis." Prostatitis is an inflammation of the prostate. The cause of prostatitis is not generally known but it could be from infection, irritation, or sexual activity. Dr. Brodherson did not recommend any course of treatment—in addition to the previously prescribed medications—at that time.

In 1983, defendant's father, Robert De Niro, Sr., (Mr. De Niro) was diagnosed with prostate cancer. Mr. De Niro later died as a result of that disease. Defendant was 40 years old at the time Mr. De Niro was diagnosed with prostate cancer. Defendant understood that genetics played a role in prostate cancer. Defendant's risk was higher than that of a person whose father did not have prostate cancer. Shortly after learning of Mr. De Niro's diagnosis, on December 30, 1983, defendant consulted with Dr. Brodherson. Defendant desired to know the steps he should take to monitor and maintain his own prostate health. Defendant said he wanted to come in three to four times a year for examinations. These regular examinations were to include a blood screen to check his prostate specific antigens. Defendant subsequently adhered more or less to that schedule. Dr. Brodherson told defendant a prostate specific antigen below four was normal. Defendant wanted to be very clear about making sure he was healthy. An entry in Dr. Brodherson's records for December 30, 1983, stated: "'I told the patient if he is that worried about cancer when he reaches 50 we can even do a biopsy periodically. He said that might be a good idea.'" But Dr. Brodherson had no independent recollection of having that discussion with defendant. And defendant did not recall the conversation either.

On July 20, 1993, Dr. Brodherson recorded that defendant had dysuria, that is, mild burning on urination. Dr. Brodherson prescribed an antibiotic. Dr. Brodherson had no reason to believe the condition was not resolved after that visit. In response to

questions asked at his deposition, Dr. Brodherson agreed that this condition, dysuria, might be a symptom of prostatitis, of benign prostatic hyperplasia (an enlarged prostate), or of prostate cancer. "Benign prostatic hyperplasia" is also known as "benign prostatic hypertrophy" or BPH. (<http://kidney.niddk.nih.gov/ kudiseases/pubs/ 8 prostateenlargement/#common>) For purposes of clarity, we refer to this condition as benign prostatic hyperplasia. Dr. Brodherson testified: "I may not have ever used the words 'BPH,' but . . . it's a known fact that men as they age develop [benign prostatic hyperplasia]. I would speak to [defendant] and say, the prostate grows, mine gro[w]s, your[s] gro[w]s, and that would be the tone of the conversation. I didn't say, 'You have BPH.'" Defendant's testimony was consistent. He was not familiar with the term "'benign prostatic hyperplasia'" and he did not think he had heard that term. He did not remember hearing the term "BPH." Defendant also did not think he really understood what prostatitis was; he was not told, "'You have prostatitis.'"

Dr. Brodherson's August 2, 1995 notes reflect that defendant had nocturia. In other words, defendant was getting up at night to urinate. In response to deposition questions, Dr. Brodherson agreed that this could be a symptom of: prostatitis; benign prostatic hyperplasia; or prostate cancer. Dr. Brodherson did not prescribe any medication for the nocturia. Dr. Brodherson did not order any specific tests as a result of defendant's nocturia. Dr. Brodherson had no independent recollection of having discussed the diagnosis with defendant. But Dr. Brodherson assumed he had such a discussion. Defendant testified that at the time, "I was urinating maybe two, three times at night and it was . . . interrupting my sleep . . . ." Defendant did not understand that frequent urinating at night could be a symptom of prostatitis. Defendant did not know what prostatitis was. He did not understand that frequent urination at night could be a sign of an enlarged prostate. No one told defendant, "'[Y]ou have prostatitis," and he did not really understand what the condition entailed. Defendant just knew that, "I had a prostate that was causing me to have to go to the bathroom more often." At some later point in time, Dr. Brodherson's notes reflect that defendant had "mild hesitancy"

meaning the urine stream was not what it once was. Dr. Brodherson agreed in response to questioning that this could be a symptom of: prostatitis; benign prostatic hyperplasia; or prostate cancer.

Defendant also had annual physical examinations, usually with Dr. Gary Lee Gitnick, in Los Angeles. Dr. Gitnick testified: "It is my policy, at the time of an annual physical, to have my patients seen, first by me, then by a urologist, a cardiologist, and a dermatologist all of whom come to my suite. [¶] Then we do testing, which generally we have a series of routine tests, plus any additional tests that might be required because of specific complaints." Those annual physicals included examination by an urologist, prostate specific antigen tests, and rectal exams. In February 1999, Dr. Gitnick told defendant, "Basically that things are okay other than a few discomforts and things that [defendant] had." Dr. Gitnick prescribed Flomax for use at defendant's option. Defendant testified the frequent urinating at night was an inconvenience, but he never used Flomax.

On February 25, 1999, defendant saw Dr. Robert Evan Reiter, an urologist, on Dr. Gitnick's recommendation—for a general urological examination. This was the first time Dr. Reiter saw defendant as a patient. Dr. Reiter saw defendant in Dr. Gitnick's office. Defendant testified, "I saw [Dr. Reiter] as a matter of routine checkup." Defendant told Dr. Reiter he was getting up to urinate two to three times a night. Dr. Reiter's first diagnosis was, "'[M]ild to moderate benign prostatic hyperplasia, with mild to moderate lower urinary tract symptoms.'" Dr. Reiter discussed the results of the examination with defendant. Due to the passage of time, Dr. Reiter could not recall their exact discussions. Dr. Reiter's recollections were based on the medical records he prepared. Dr. Reiter thought he probably would have used the diagnosis "'benign prostatic hyperplasia'" during their discussion. Dr. Reiter testified "disorder" was probably a reasonable word to use in relation to defendant's prostate condition. But Dr. Reiter had no actual recollection of using those terms. Dr. Reiter testified defendant's case was mild. Dr. Reiter talked to defendant about Flomax: "I'm sure that I told him it's to enable him to

urinate better. [¶] . . . [¶] . . . Perhaps less frequently at night, with a stronger stream. It would just hopefully make his quality of life a little better." Dr. Reiter doubted he would have used a term like "nocturia" with a patient; he would probably have used words to the effect of getting up at night in order to urinate. Dr. Reiter had no recollection of discussing actual prostate specific antigen test results with defendant. Also, defendant testified he was never told he had mild to moderate benign prostatic hyperplasia or an enlarged prostate. Dr. Reiter prescribed Flomax; defendant explained, "It helps you when you go to the bathroom at night." But defendant was "wary" of taking it. As Flomax was prescribed only as an optional treatment, defendant never took the medication.

As noted above, Dr. Brodherson had told defendant a prostate specific antigen result below 4.0 was normal. Between 1983 and 2002, defendant's prostate specific antigen results fluctuated between 0.9 and 2.0. But on March 8, 2001, defendant's prostate specific antigen was 2.7. He was told the results of his rectal examinations were normal. Defendant was never told that the prostate specific antigen results were any reason for concern. In 2002, defendant's prostate specific antigen result was over 2.0. Subsequent test results ranged from 2.0 to 3.3. At his deposition, Dr. Brodherson was asked whether the increase in prostate specific antigen between January 18, 2000 and May 31, 2003, from 2.1 to 3.7, was a concern to him. Dr. Brodherson responded in the negative. Dr. Brodherson testified, "It was commensurate with aging and commensurate in keeping with benign prostatic hyperplasia, which we know [defendant] had, and is consistent with a normal reading of under 4." Dr. Brodherson concluded that at no time did defendant have any symptoms of benign prostatic hyperplasia that warranted any treatment.

On March 6, 2003, defendant was again examined by Dr. Reiter. This was part of defendant's annual physical examination. Defendant's nocturia had continued. Dr. Reiter again discussed Flomax with defendant. Defendant had not taken Flomax when Dr. Reiter earlier prescribed it. Dr. Reiter testified he communicated a diagnosis of

benign prostatic hyperplasia and explained that the Flomax was being prescribed to deal with urinary issues related to benign prostatic hyperplasia. Dr. Reiter believed defendant understood that the urinary problems were related to the benign prostatic hyperplasia condition. Dr. Reiter did not find that defendant's prostate had increased in size. Defendant's prostate specific antigen level was 3.3 or 3.4. Dr. Reiter's notes of that date reflect, "I explained to [defendant] that I would not be concerned about any change that is less than 0.8 per year, and I think, given the very slow rate of change, this is more likely secondary to benign prostatic hyperplasia and not indicative of cancer." In deposition testimony, Dr. Reiter said he "assume[d]" he again communicated the benign prostatic hyperplasia diagnosis during the March 6, 2003 examination. Dr. Reiter discussed with defendant that Flomax was prescribed to deal with urinary issues related to benign prostatic hyperplasia. Defendant said he had not taken the Flomax. Dr. Reiter thought he probably said "benign prostatic hyperplasia"; but he had no recollection of describing it as a disorder. Dr. Reiter further testified he would not have said the condition was something defendant needed to be concerned about. Dr. Reiter explained, "Because it's a very common problem, disorder, and his case was mild, and I'm sure I told him it was simply an issue of his quality of life." According to defendant, Dr. Reiter said he was not concerned by the result because: defendant's rectal examination was normal; his prostate specific antigen levels were increasing slowly; and a result under 4.0 was normal. Defendant testified, "All I know is that he told me to take Flomax."

In May 2003, Dr. Brodherson examined defendant. At that time, defendant's prostate specific antigen level was 3.7. Defendant declared, "Dr. Brodherson did not tell me that time that I should have a prostate biopsy or take any other action with respect to my prostate health, and I was not alarmed by the result."

By the summer of 2003, defendant decided he wanted a second opinion about his prostate health. He had been told repeatedly not to worry, but he felt that getting a second opinion was the smart thing to do. In support of his summary judgment motion, defendant declared, "In the summer of 2003, having watched Joe Torre, Rudy Giuliani

and John Kerry fight public battles with prostate cancer, I decided to be even more proactive about monitoring my prostate health." In deposition testimony defendant explained: "I was concerned. I thought, let me just—I'm seeing John Kerry, Joe Torre, Rudy Giuliani, these guys are my age and have this problem, let me go be more proactive." Defendant further explained: "I was concerned because of my age, and because [my prostate specific antigen] was rising a bit. Although everybody was telling me there's no problem, I still was concerned because my father had died from it and I just wanted to be a little more proactive."

Defendant saw Dr. Brodherson again on September 29, 2003. Defendant's prostate specific antigen was 3.1 and his rectal examination was normal. Dr. Brodherson said the results were, "[S]till okay." Defendant further declared: "Even so, Dr. Brodherson agreed that it would not be a bad idea to have additional tests to confirm my prostate health. I then consulted with [Jerome P. Richie, M.D.] who was the Chief of Urology at Brigham & Women's Hospital in Boston." It was Dr. Brodherson who recommended Dr. Richie.

With respect to the September 29, 2003 examination, Dr. Brodherson testified he never recommended that a biopsy be taken. It was not Dr. Brodherson's independent opinion that defendant should have a biopsy. Dr. Brodherson never recommended a biopsy until defendant brought it up. But when defendant said a friend had suggested getting a biopsy, Dr. Brodherson said, "[S]ure, get a biopsy." Dr. Brodherson agreed, in light of defendant's desire to be more proactive, that it would not be a bad idea to have additional tests. At his deposition, Dr. Brodherson testified that most people assume that when a biopsy is done it is to look for cancer. But in defendant's case, a specific fear of cancer was not the issue. Dr. Brodherson explained, "That was not the atmosphere at the time at all" and characterized the decision to pursue a biopsy as a "fishing expedition."

On September 30, 2003, defendant saw Dr. Richie. Dr. Richie told defendant: his prostate specific antigen levels were in the normal range and his rectal examination was normal; but because defendant's father had died of prostate cancer and given other

factors such as defendant's age, Dr. Ritchie strongly recommended defendant undergo a biopsy. Dr. Richie was concerned about defendant's prostate specific antigens and family history. Dr. Richie also discussed with defendant that there were a number of studies concerning prostate specific antigen levels. There was no specific discussion of the studies. Defendant did not remember Dr. Richie saying that the recommended range for getting a biopsy was 2.5 to 4.0. Defendant was asked at his deposition, "Did Dr. Richie tell you during any of your visits with him that it was his opinion that you had a 40 percent chance of having cancer?" Defendant replied, "He mentioned that." In connection with his summary judgment motion defendant declared: "[Dr. Richie] did not tell me that he believed I had any disorder or problem with my prostate or that I required any treatment. I understood that the biopsy was another test and believed it would confirm all of the other information indicating that I did not have prostate cancer. I scheduled an appointment with Dr. Richie on a non-urgent basis for the biopsy and it was performed [o]n October 10, 2003." Defendant was "shocked" when he learned, on October 15, 2003, that the biopsy was positive for cancer.

Dr. Richie discussed the reason defendant was referred to him, "[T]he referral was relative to [defendant's] [prostate specific antigen] level." It appeared to Dr. Richie that defendant did not specifically understand the reason for the referral. They discussed defendant's prostate specific antigen level and family history. Dr. Richie testified, "I told him that [his father's history] increases his potential risk, because there can be some genetic foundation for prostate cancer." Dr. Richie was asked, "Did you tell [defendant] how much family history alone increases a chance of prostate cancer if it is your father who does have prostate cancer?" Dr. Richie replied, "No, I did not." Dr. Richie said that technically, defendant's prostate specific antigen readings were in the normal range. But Dr. Ritchie stated he was concerned about the trend. Dr. Richie further testified: "I told [defendant] that the trend [in his prostate specific antigen readings] was increasing, although the most recent [prostate specific antigen] had gone down and that there was controversy about [prostate specific antigen] levels, that the standard was a [prostate

specific antigen] of 4 or above was abnormal, but . . . a number of studies suggested that [prostate specific antigens] between 2.5 and 4 could be in a relative risk range." Dr. Richie said, "I would have told [defendant] that the only way to diagnose prostate cancer is with a biopsy."

B. The Cast Insurance Policy

Plaintiff issued a Motion Picture Television Producers Portfolio Policy to Fox Entertainment Group, Inc. This was a "blanket" policy. Such policies are issued to movie studios that produce more than three or four movies a year. The insurance policy covered Fox Entertainment Group, Inc. productions undertaken during the policy period. The insurance extended to cast members provided they completed a Medical Certificate and Affidavit (medical certificate) and passed a physical exam. The policy covered losses resulting when particular cast members were unavailable, due to injury or illness, during a production period. Defendant understood this was the purpose of the cast insurance.

It was undisputed that: on October 10, 2003, defendant underwent a prostate biopsy procedure; on October 13, 2003, plaintiff submitted to a cast medical examination and executed a medical certificate in connection with the insurance coverage at issue here; and on October 15, 2003, defendant was diagnosed with prostate cancer. In deposition testimony, defendant said he understood that the reason for the physical examination and the medical certificate was to assist in the process by which a production company obtains insurance to protect itself against losses if performers cannot work.

Defendant described the medical examination he underwent for insurance purposes as follows: "In early October 2003, I was told that I had to undergo a cast medical exam for Hide and Seek. It was scheduled for October 13, 2003 and it took place in a retail store where I was being fitted for costumes for Hide and Seek. The exam was conducted by someone who identified himself as Dr. Katz, who has conducted cast

exams for other movies I have done. Dr. Katz asked me a series of 'yes' or 'no' questions about my health and then some questions about when my last medical exam took place, who conducted it. He collected some information such as my blood pressure and weight and then he gave me a form to sign." (Italics omitted.) Defendant read the medical certificate "perfunctorily," as this was a routine matter.

Dr. Louis Katz conducted defendant's October 13, 2003 medical examination. Dr. Katz described his routine when conducting a cast medical examination: "The cast exam obviously is like any history and physical where you review the patient's history. [¶] I also use my own history and physical questionnaire, in addition to any of the cast medical certificates we use. [¶] The patient completes them. [¶] I review particular symptoms that the patient may remark about. [¶] First I go through a family history, medications, allergies; medications, of course, that are prescribed by physicians or over-the-counter products. [¶] I go into the indications for these products. [¶] I usually will ask for the doctor, the personal physician of the individual. [¶] And then I usually progress to . . . my physical of the patient." Dr. Katz recalled that defendant's medical examination took place in the late afternoon or evening in some type of retail shop. Dr. Katz described the beginning of defendant's examination, ". . . I greeted him, asked him how he was, was there anything in particular that had occurred since our last examination, I think it was six months earlier, what medications he was on . . . ." Dr. Katz described his memory of the examination as only fair. Dr. Katz thought the last examination had occurred six months earlier. Dr. Katz said it was his routine to ask whether anything had transpired medically since their last meeting. Dr. Katz further testified, "I was aware of the fact that his father had prostate cancer."

Defendant executed the medical certificate. The medical certificate included the following question A5: "Please advise if you, to the best of your knowledge and belief have ever been diagnosed with or treated for anything related to the following conditions. Please answer 'yes or no' to each question below and provide full details of any 'yes' answers on page 3 . . . . [¶] . . . [¶] 5. disorders of the urinary track including but not

limited to sugar, albumin, blood or pus in urine, kidney stones, or any other disorder to the bladder, kidney, or disorders of the genito-urinary system, including but not limited to the reproductive organs or prostate glands." Defendant answered "No." In addition, just above defendant's signature, the "Affidavit and Authorization" section of the medical certificate stated in part: "I DECLARE AND AFFIRM . . . that the statements made hereon are true, correct and complete, and that I have withheld no information known to me which might alter or otherwise conflict with the statements made by me." In support of his summary judgment motion, defendant declared that on October 13, 2003, when he executed the medical certificate, he did not believe that he suffered from prostate cancer or any other prostate condition, and, based on what he knew at that time, he truthfully answered the questions asked, including questions about his prostate health.

The parties agreed the following fact was undisputed, "On October 20, 2003, Fox [Entertainment Group] informed [plaintiff], through its insurance broker, of [defendant's] diagnosis and that it was anticipated that [defendant] would be unavailable for medical reasons for approximately three months." Defendant's treatment delayed production of Hide and Seek for nearly three months, from October 27, 2003, until January 19, 2004. Plaintiff covered the loss and paid Fox Entertainment Group, Inc., the insured, nearly $2 million as a result of the delay. If plaintiff had known defendant had undergone a prostate biopsy it would only have accepted him for coverage subject to an exception for disorders of the prostate.

C. The Complaint

Plaintiff filed an October 12, 2006 complaint against defendant for fraud and negligent misrepresentation. In its first cause of action for fraud, plaintiff alleged: "The representations made by defendant . . . in the Medical Certificate dated October 13, 2003, were false representations of fact"; the false representations were made with the intent to keep plaintiff "in the dark about the outstanding biopsy procedure"; defendant knew

when he answered question A5 in the negative that he was awaiting the results of the prostate biopsy; and defendant knew those results might alter or conflict with his negative response to question A5. In its second cause of action for negligent misrepresentation plaintiff alleged: "Defendant . . . was negligent in making the October 13, 2003 representations of fact in response to question A5 of the Medical Certificate and in the execution of the affirmation inasmuch as he knew, or reasonable should have known, that the results of the biopsy procedure he had undergone just three days earlier might alter his negative answer." The gravamen of the complaint is that on October 13, defendant failed to reveal that on October 10, 2003, he underwent the biopsy procedure.

D. The Summary Judgment Motion

Defendant filed a summary judgment motion. Defendant asserted: he neither knew nor had reason to suspect, prior to October 15, 2003, that he had prostate cancer; he truthfully answered the questions on the medical certificate; and he promptly notified plaintiff of his diagnosis. Plaintiff opposed the summary judgment motion. Plaintiff presented evidence: there had been an upward trend in defendant's prostate specific antigen levels; there was a family history of prostate cancer; defendant was advised he had a 40 percent chance of developing prostate cancer; and defendant had experienced urinary symptoms over many years that were consistent with but not necessarily indicative of prostate disorders including cancer. Plaintiff also presented evidence defendant had been diagnosed with prostatitis and benign prostatic hyperplasia.

The trial court overruled the parties' evidentiary objections and granted defendant's summary judgment motion. The trial court ruled that because defendant was not diagnosed with prostate cancer until October 15, 2003, two days after he signed the medical certificate, he did not make any false statements on that document. The trial court noted: "Plaintiff's Medical Certificate did not ask Defendant whether he had reason to suspect he had certain disorders, whether he had been told he needed diagnostic

tests to determine if he had certain disorders, whether he had undergone any diagnostic tests, or what he had been told relative to his need for any diagnostic tests. Rather, the Medical Certificate asked whether Defendant had been 'diagnosed with or treated for anything related to . . . disorders of the . . . prostate glands.' Defendant's [Prostate Specific Antigen] levels, his risk of having prostate cancer, his non-cancer specific symptoms, and his prostate biopsy procedure were not encompassed within Plaintiff's question, and are not relevant to the allegations of the complaint." As to evidence defendant had been diagnosed with prostatitis and benign prostatic hyperplasia, the trial court concluded: "This evidence is irrelevant because [it was] raised for the first time in opposition to summary judgment. Plaintiff's Complaint does not allege that Defendant committed fraud or negligent misrepresentation by failing to disclose his prostatitis and [benign prostatic hyperplasia]. As a result, the issue of Defendant's prostatitis and [benign prostatic hyperplasia] is not before the Court. [¶] Even if the Court considered the issues of prostatitis or [benign prostatic hyperplasia], there was no evidence submitted that [defendant] knew that he had been diagnosed with or treated for any disorder of the urinary tract [or] prostate gland at the time that he completed the medical certificate on October 13, 2003. Defendant submitted evidence indicating that [defendant's] doctors had told him that neither of these conditions was cause for concern. . . . Thus the only evidence indicates that, to the best of [defendant's] knowledge as of October 13, 2003, [that] neither condition constituted a disorder, and he was not obligated to disclose either condition on the Medical Certificate."

III. DISCUSSION

A. Summary Judgment

1. Standard of Review

In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851, our Supreme Court described a party's burdens on summary judgment motions as follows: "[F]rom

commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . . [¶] [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (Fns. omitted, see *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) As we will discuss in some detail later, the issues to be resolved are limited by those raised in the operative pleadings.

We review the trial court's decision to grant the summary judgment motion de novo. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65, 67-68; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1188, disapproved on another point in *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 853, fn. 19.) The Supreme Court has held: "Because [the appeal is] from the trial court's grant of summary judgment against [a party], we must 'independently examine the record in order to determine whether triable issues of fact exist to reinstate the action.' (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142; see also *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) 'In performing our de novo review, we view the evidence in the light most favorable to [the appellant]' (*Wiener* [*v. Southcoast Childcare Centers, Inc.*], *supra,* [32 Cal.4th] at p. 1142), and we 'liberally construe' [the appellant's] evidence and 'strictly scrutinize' that of [the respondent] 'in order to resolve any evidentiary doubts or ambiguities in [the appellant's] favor' (*ibid.*)." (*O'Riordan v. Federal Kemper Life*

Assurance Co. (2005) 36 Cal.4th 281, 284; accord, *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1484-1485.)

2. Defendant's Summary Judgment Motion Was Properly Granted

a. The law governing misrepresentation in procuring insurance

As noted above, plaintiff asserted two causes of action against defendant—fraud and negligent misrepresentation. The elements of a cause of action for fraud are: misrepresentation, including nondisclosure; knowledge of falsity; intent to induce reliance; justifiable reliance; and resulting damage. (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 990; *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173.) The elements of a negligent misrepresentation claim are, as described by the Court of Appeal: "(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage. (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 983 (*Shamsian*.) In contrast to fraud, negligent misrepresentation does not require knowledge of falsity. A defendant who makes false statements '"honestly believing that they are true, but without reasonable ground for such belief, . . . may be liable for negligent misrepresentation . . . ." [Citations.]' (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407-408.)" (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.)

The present case arises in the specific context of representations made in the course of acquiring insurance coverage. An insurer has a right to learn all that the insurance applicant knows regarding the state of her or his health and medical history. (*Cohen* v. *Penn Mut. Life Ins. Co*. (1957) 48 Cal.2d 720, 727; *Burns* v. *Prudential Ins. Co*. (1962) 201 Cal.App.2d 868, 869-870.) The material misrepresentation or

concealment of facts concerning the applicant's health and medical history are grounds for rescission of the policy. (*Thompson v. Occidental Life Ins. Co.* (1973) 9 Cal.3d 904, 916; *Cohen v. Penn Mut. Life Ins. Co., supra*, 48 Cal.2d at p. 725.) Materiality is determined solely by the probable and reasonable effect which truthful answers would have had upon the insurer. (Ins. Code, § 334; *Thompson v. Occidental Life Ins. Co., supra*, 9 Cal.3d at p. 916.) The fact that the insurer has demanded answers to specific questions in an application for insurance is itself usually adequate to establish materiality as a matter of law. (*Thompson v. Occidental Life Ins. Co., supra,* 9 Cal.3d at p. 916; *Cohen v. Penn Mut. Life Ins. Co., supra*, 48 Cal.2d at p. 726.) But if an insurance applicant had no present knowledge of the facts sought, or failed to appreciate the significance of information related to him or her, incorrect or incomplete responses do not constitute grounds for rescission. (*Cohen v. Penn Mut. Life Ins. Co., supra*, 48 Cal.2d at p. 726; *Ransom v. Penn Mutual Life Ins. Co.* (1954) 43 Cal.2d 420, 426; see Ins. Code, §§ 332, 333.) Moreover, our Supreme Court has held, "[Q]uestions concerning illness or disease do not relate to minor indispositions but are to be construed as referring to serious ailments which undermine the general health." (*Ransom v. Penn Mutual Life Ins. Co., supra*, 43 Cal.2d at p. 427; accord, *Thompson v. Occidental Life Ins. Co., supra*, 9 Cal.3d at p. 916.) As the Supreme Court explained in *Cohen v. Penn Mut. Life Ins. Co., supra,* 48 Cal.2d at page 725, the failure to mention a minor indisposition will not revoke the policy: "Where an applicant for insurance is asked generally whether he has had or been treated for any disease or ailment, the failure to mention minor or temporary indispositions is not material to the risk and will not avoid the policy. [Citations.] But the rule is otherwise when the applicant is asked specific questions as to his medical history, and false answers thereto will vitiate the contract. [Citations.]" (See *Thompson v. Occidental Life Ins. Co., supra,* 9 Cal.3d at p. 916.)

More recently, the Supreme Court discussed the insured's obligation to communicate information in *O'Riordan v. Federal Kemper Life Assurance Co., supra,* 36 Cal.4th at pages 286-287: "Under California law, every party to an insurance contract

must ‘communicate to the other, in good faith, all facts within his knowledge, which are . . . material to the contract . . . and which the other has not the means of ascertaining.’ (Ins. Code, § 332.) ‘Materiality’ is determined by ‘the probable and reasonable influence of the facts upon the party to whom the communication is due . . . .’ (§ 334.) [¶] When an insured has engaged in ‘concealment,’ which is defined by statute as the ‘[n]eglect to communicate that which a party knows, and ought to communicate’ ([Ins. Code,] § 330), the insurer may rescind the policy, even if the act of concealment was unintentional ([Ins. Code,] § 331). Similarly, a materially false representation at the time of, or before, issuance of a policy may result in rescission of the policy. ([Ins. Code,] § 359.) Thus, when an applicant for life insurance misrepresents his or her history as a smoker in order to obtain a nonsmoker rate, the insurer may rescind the policy. (*Old Line Life Ins. Co. v. Superior Court* (1991) 229 Cal.App.3d 1600, 1603-1606.)” (Fn. omitted.)

In *Cohen v. Penn Mut. Life Ins. Co.*, *supra*, 48 Cal.2d at pages 723-727, for example, a life insurance policy was rescinded because the insured, a medical doctor, failed to disclose a serious heart problem. The insured specifically represented: he had not consulted a physician nor received any treatment for his health for 10 years; he was in good health; he had never had a special heart study or an electrocardiogram; and there had never been any suspicion of, nor had he been treated for, any disease of the heart or blood vessels or high blood pressure. (*Id.* at p. 723.) The true facts were that the insured, who died of a heart attack, had undergone a special heart study and an electrocardiogram, with abnormal results, and had been discharged from the Army because of high blood pressure. (*Id.* at pp. 723-725; see also *Telford v. New York Life Ins. Co.* (1937) 9 Cal.2d 103, 104-107 [insured represented she had never been under observation or treatment in any hospital, and failed to reveal a 10-day hospitalization during which her left breast was removed]; *San Francisco Lathing Co., Inc. v. Penn Mut. Life Ins. Co.* (1956) 144 Cal.App.2d 181, 182-187 [insured specifically misrepresented he had never been treated

for spitting of blood or shortness of breath].) In *Cohen*, our Supreme Court upheld a jury verdict in the insurer's favor concluding the insured's misrepresentations were material.

In contrast, *McAuliffe v. John Hancock Mutual Life Ins. Co.* (1966) 245 Cal.App.2d 855, 856-858, involved only an undisclosed temporary indisposition. The insured successfully applied to reinstate a lapsed policy. The insured represented that he had no injury, ailment, illness or disease or symptom thereof and had not consulted nor been treated by a physician during the period his life insurance policy was lapsed. It later developed that the insured, during the relevant time period, had in fact consulted a doctor because of a hangover. According to the Court of Appeal, "The doctor stated that the insured 'has bronchitis, nervous, admits drinking, liver enlarged, had tremor of the hand, blood pressure 130 over 80, pulse 110, has wheezing with the lungs.'" (*Id.* at p. 857.) But there was no evidence the doctor had communicated those conclusions to the insured. A jury impliedly found the insured's consultation with the doctor was for a temporary indisposition only and the insured had not misrepresented any material fact. The Court of Appeal affirmed the judgment for the insured's beneficiary. The Court of Appeal concluded the evidence fully supported the jury's implied finding. (*Id.* at pp. 857-858; see also *Ransom v. Penn Mut. Life Ins. Co., supra,* 43 Cal.2d at pp. 426-427; *Jefferson Standard Life Ins. Co. v. Anderson* (1965) 236 Cal.App.2d 905, 910-911; *Pierre v. Metropolitan Life Ins. Co.* (1937) 22 Cal.App.2d 346, 349-350.)

b. Application to the present case

Plaintiff argues defendant did not meet his summary judgment burden or, if he did, then a triable issue of material fact remains in that he was required to disclose that: he had undergone a prostate biopsy; he had been told he had a 40 percent chance of developing prostate cancer; and he had been treated "for other prostate disorders," that is, prostatitis and benign prostatic hyperplasia. Plaintiff does not limit its argument to the matters alleged in the complaint—that defendant made false representations in

connection with his response to question A5 insofar as he failed to disclose the prostate biopsy. Instead, plaintiff contends: "[Defendant] had the burden of presenting evidence showing that during the [medical] exam he disclosed everything he knew regarding the state of his health and medical history that could have had an effect on [plaintiff's] coverage decision, and disclosed all facts that materially qualified the facts disclosed." Plaintiff argues defendant made five positive misrepresentations of fact "during the exam and in the [medical certificate]": "1. He was in sound health, free from disease, and in a fit condition. [¶] 2. He had never been diagnosed with a disorder of the prostate. [¶] 3. He had never been treated for a disorder of the prostate. [¶] 4. Statements 1, 2, and 3 were true, correct, and complete. [¶] [and] 5. He withheld no information known to him that might altar or otherwise conflict with Statements 1, 2, and 3."

We limit our discussion to the issues raised by the operative pleadings. A summary judgment motion is directed to the issues framed by the pleadings. (*Conroy v. Regents of University of Cal.* (2009) 45 Cal.4th 1244, 1250; *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673, superseded by statute on a different point as stated in *Saelzler v. Advanced Group 400, supra*, 25 Cal.4th at pp. 767-768.) Those are the only issues a motion for summary judgment must address. (*Ibid.; Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 364.) In a summary judgment proceeding, the pleadings delimit the scope of the issues. (*Conroy v. Regents of University of Cal., supra*, 45 Cal.4th at p. 1250; *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 161; *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381; *Orange County Air Pollution Control Dist. v. Superior Court* (1972) 27 Cal.App.3d 109, 113.) Our Supreme Court has held, "The materiality of a disputed fact is measured by the pleadings [citations], which 'set the boundaries of the issues to be resolved at summary judgment.' [Citations]." (*Conroy v. Regents of University of Cal., supra*, 45 Cal.4th at p. 1250, citing *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648.) The present complaint alleges defendant fraudulently or negligently failed to disclose in

connection with question A5 of the medical certification that he had undergone a prostate biopsy. The complaint makes no allegations with respect to defendant's interactions with Dr. Katz or defendant's medical history with respect to prostatitis or benign prostatic hyperplasia. Therefore, in moving for summary judgment, defendant had no burden of persuasion beyond the alleged failure to disclose that he had undergone a prostate biopsy procedure.

We agree with the trial court there was no triable issue of material fact with respect to defendant's failure to disclose that he had undergone a prostate biopsy procedure. As noted above, question A5 asked, "Please advise if you, to the best of your knowledge and belief[,] have ever been diagnosed with or treated for anything related to the following conditions. Please answer 'yes or no' to each question below and provide full details of any 'yes' answers . . . disorders of the urinary track . . . or any other disorder to the . . . genito-urinary system, including but not limited to the . . . prostate glands." The undisputed facts were that defendant had been consistently and repeatedly told over an extended period of time that he had no reason to be concerned about the current state of his prostate health. He had experienced only a minor indisposition insofar as he got up two or three times a night to urinate. He did not take any medication to relieve this problem. He was offered but did not take Flomax to relieve his symptoms. He was told this was simply a quality of life issue. All of his test results—prostate specific antigen and rectal examination—had been normal. Contrary to plaintiff's repeated assertion at oral argument, there was no evidence Dr. Richie specifically told defendant, prior to the biopsy, that there was a 40 percent probability he already had prostate cancer. Dr. Brodherson did not think defendant needed a prostate biopsy. In defendant's view, the biopsy was just another routine test that he expected would confirm he did not have prostate cancer. In these circumstances, defendant did not commit fraud and did not negligently misrepresent the facts when failed to reveal he had undergone a prostate biopsy procedure in response to question A5.

B. Leave To Amend

Plaintiff contends the trial court abused its discretion in denying it leave to amend its complaint. We reject that argument for two reasons. First, plaintiff argues—but has not shown—that it "requested" leave to amend its complaint at the hearing on the summary judgment motion. Plaintiff asserts: "At the hearing, [plaintiff] *requested* leave to amend its complaint . . . . The Court did not *grant* that *request.*" (Italics added.) Plaintiff cites the *entire* reporter's transcript of the summary judgment hearing in support of its assertion. But our review of the transcript reveals no such *request.* Rather, in the course of that hearing, plaintiff's counsel stated, "If there's any question that the issue [extends beyond the alleged failure to disclose the biopsy], [defendant] made two misrepresentations and we have now learned a full array of information which should have been disclosed which wasn't, then [plaintiff] has every right to amend to conform to proof, whether it's now or at the time of trial after the evidence comes in." Hence, there was no request for the trial court to deny. (See *Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 217 & fn. 15.)

Moreover, it is well settled that defendant could not raise unplead issues in opposition to plaintiff's summary judgment motion. As discussed above, a summary judgment motion is directed to the issues framed by the pleadings. (*Turner v. Anheuser-Busch, Inc.*, *supra,* 7 Cal.4th at p. 1252; *Ann M. v. Pacific Plaza Shopping Center*, *supra,* 6 Cal.4th at p. 673.) Those are the only issues a summary judgment motion must address. (*Ibid.; Goehring v. Chapman University*, *supra,* 121 Cal.App.4th at p. 364.) In a summary judgment proceeding, the pleadings delimit the scope of the issues. (*FPI Development, Inc. v. Nakashima*, *supra*, 231 Cal.App.3d at p. 381; *Orange County Air Pollution Control Dist. v. Superior Court*, *supra,* 27 Cal.App.3d at p. 113.) If a plaintiff wants to change its allegations, leave to amend its pleading should be sought *before* the hearing on a summary judgment motion. (*Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1104, fn. 22; *Distefano v. Forester* (2001) 85 Cal.App.4th

1249, 1264-1265; *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1699; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) ¶ 10:257, pp. 10-97—10-98 (rev. #1, 2008); see *580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 18; *City of Hope Nat. Medical Center v. Superior Court* (1992) 8 Cal.App.4th 633, 639.) The Court of Appeal has held, "A defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers. [Citation.]" (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98-99, fn. 4; accord, *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1253.) Absent a timely request for leave to amend, a party forfeits the right to raise new issues in response to a summary judgment motion. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 332-333; *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663-1664.) Plaintiff did not seek to amend its complaint prior to the hearing on the summary judgment motion. The trial court did not abuse its discretion.

Plaintiff further asserts: "With its Motion for New Trial, [plaintiff] formally requested leave to file a First Amended Complaint. . . . The trial [c]ourt refused to hear the motion. A trial court has wide discretion to grant leave to amend a complaint. (*Atkinson v. Elk Corp. 39* (2003) 109 Cal.App.4th 739, 761.) Absent prejudice, however, a court abuses that discretion if it refuses to grant leave to amend. (*Id*.) [Defendant] did not make a showing that he would have suffered prejudice if the complaint had been amended. Therefore, the trial court abused its discretion in refusing to grant [plaintiff] leave to amend its complaint." On April 28, 2008, more than a month after the summary judgment was entered, plaintiff filed a motion for leave to file a first amended complaint. Defendant objected to and moved to strike plaintiff's motion. The trial court denied the motion for leave to file an amended complaint. We review the trial court's order denying the belated motion to amend the complaint for an abuse of discretion. (*Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, 1097; *Leader*

v. Health Industries of America, Inc. (2001) 89 Cal.App.4th 603, 612.) The burden was on plaintiff to make a strong showing that the failure to seek to amend earlier was excused. (*Barnes v. Berendes* (1903) 139 Cal. 32, 35; *Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 746; *Davies v. Symmes* (1942) 49 Cal.App.2d 433, 444.) Neither in the trial court nor on appeal has plaintiff made any showing its failure to seek leave to amend prior to entry of the judgment was excusable. We find no abuse of discretion.

IV. DISPOSITION

The judgment is affirmed. Defendant, Robert De Niro, is to recover his costs on appeal from plaintiff, Fireman's Fund Insurance Company.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

MOSK, J.

KRIEGLER, J.